STATE OF MICHIGAN
IN THE SUPREME COURT

BRUCE MILLAR,

Plaintiff/**Appellant**,

v.

CONSTRUCTION CODE AUTHORITY, CITY OF IMLAY CITY, and ELBA TOWNSHIP,

Defendants/**Appellees**.

Supreme Court No. 154437
Court of Appeals No. 326544
Lapeer Circuit Court
Case No. 14-047734-CZ
Hon. Nick O. Holowka

_____/

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_____/

DEFENDANT/APPELLEE ELBA TOWNSHIP'S
ANSWER TO PLAINTIFF/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

Respectfully submitted,
LANDRY MAZZEO & DEMBINSKI, PC

By: */s/ Nancy Vayda Dembinski*
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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. MCL 15.363(1) requires a claimant to file suit under the Michigan Whisteblowers' Protection Act (WPA) "within 90 days after the occurrence of the alleged violation of this act." Plaintiff's Complaint alleges that Elba Township violated the WPA when the Township requested, in a letter to Plaintiff's supervisor dated March 11, 2014, that he no longer perform building inspections for the Township. Plaintiff's Complaint was filed June 26, 2014, which is 107 days after the Township's March 11, 2014 letter.

A. Did Elba Township's alleged violation of the WPA occur more than 90-days before Plaintiff's lawsuit was filed?

Plaintiff-Appellant says:	No.
Defendant-Appellee Elba Township says:	Yes.
Trial court said:	Yes.
Court of Appeals said:	Yes.

B. Did the Court of Appeals properly apply *Joliet v Pitoniak* in analyzing when the Plaintiff's 90-day statute of limitations under the WPA began to run against Elba Township?

Plaintiff-Appellant says:	No.
Defendant-Appellee Elba Township says:	Yes.
Trial court said:	(not applicable)
Court of Appeals said:	Yes.

C. Did the timing of Elba Township's transmittal of its March 11, 2014 letter to Plaintiff's supervisor or Plaintiff's continued work in the Township until March 17, 2014 affect the date that Elba Township's alleged violation of the WPA occurred under MCL 15.363(1)?

Plaintiff-Appellant says:	Yes.
Defendant-Appellee Elba Township says:	No.
Trial court said:	No.
Court of Appeals said:	No.

D. Where the Court of Appeals never issued a finding or holding that the three Defendants were "one-in-the-same" for purposes of the WPA, was it appropriate for the Court of Appeals to conclude that the Plaintiff's WPA claims against each Defendant accrued on different dates?

Plaintiff-Appellant says:	No.
Defendant-Appellee Elba Township says:	Yes.
Trial court said:	(not applicable)
Court of Appeals said:	Yes.

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II. Under Michigan law, a claim for wrongful retaliatory discharge based on public policy is a tort. Further, under Michigan law, a claim for wrongful retaliatory discharge based on public policy is not sustainable where an applicable statutory prohibition exists against a discharge in retaliation for the conduct at issue, such as the WPA. In such cases, the WPA will provide the exclusive remedy.

A. Where the allegations of wrongful discharge contained in Plaintiff's Complaint flow from the same circumstances forming a basis for his WPA claim, was wrongful discharge claim pre-empted because the WPA provides the exclusive remedy?

Plaintiff-Appellant says:	No.
Defendant-Appellee Elba Township says:	Yes.
Trial court said:	Yes.
Court of Appeals said:	Yes.

B. Alternatively, does Elba Township have governmental immunity from this tort claim under MCL 691.1407(1)?

Plaintiff-Appellant says:	No.
Defendant-Appellee Elba Township says:	Yes.
Trial court said:	(did not answer).
Court of Appeals said:	(did not answer).

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III. At the summary disposition hearing in the trial court Plaintiff orally requested that, in the event the trial court felt that his complaint was not sufficient, he be permitted to amend his complaint. The trial court granted summary disposition to the Defendants on various grounds that did not concern the sufficiency of Plaintiff's Complaint, without expressly answering Plaintiff's oral request for amendment. Plaintiff never filed a written motion in the trial court seeking to amend his Complaint or attaching a proposed amended Complaint. Nor did Plaintiff's issues presented in the Court of Appeals ask the Court of Appeals to address whether the trial court erred in this regard. Is this an unpreserved issue for purposes of this appeal?

Plaintiff-Appellant says:	No.
Defendant-Appellee Elba Township says:	Yes.
Trial court said:	(did not answer).
Court of Appeals said:	(did not answer).

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OVERVIEW: REASONS WHY LEAVE SHOULD NOT BE GRANTED

Under the Whistleblowers' Protection Act (WPA), "A person who alleges a violation of this act may bring a civil action . . . within 90 days after the occurrence of the alleged violation of this act." MCL 15.363(1). Plaintiff-Appellant Bruce Millar (Plaintiff) asserts that, as it pertains to his claim against Defendant-Appellee Elba Township, Court of Appeals erred in concluding that "the occurrence of the alleged violation of this act" was March 11, 2014, the date the Township issued a letter to Defendant-Appellee Construction Code Authority (CCA)[1], requesting that the CCA stop assigning Plaintiff to perform plumbing and mechanical inspections within the Township. Plaintiff instead argues that "the occurrence of the alleged violation of this act" for purposes of MCL 15.363(1) was March 31, 2014, the date Plaintiff states that he actually received a letter from the CCA dated March 27, 2014, notifying him that he was not to perform inspections in the Township anymore, per the Township's request.

The Court of Appeals rejected the Plaintiff's argument, citing *Joliet v Pitoniak*, 475 Mich 30 (2006) for the proposition that, for purposes of calculating the limitations period, "accrual is measured by 'the time the wrong upon which the claim is based *was done* regardless of the time when damage results.'" *Millar v Constr Code Auth,* unpublished per curiam opinion of the Michigan Court of Appeals, issued August 4, 2016 (Docket No. 326544), pp4-5 [copy attached as **Ex A**], quoting *Joliet*, 475 Mich at 36 (emphasis in original), citing MCL 600.5827. The Court of Appeals opined that:

---

[1] Plaintiff is a plumbing, mechanical, and/or fire inspector, working at-will for the CCA. [Complaint, ¶9]. The CCA was formed through an interlocal agreement between member communities under the Michigan Urban Cooperative Act of 1967. [Complaint, Ex B, CCA Employee Manual, p4]. Elba Township and the City of Imlay City are member communities of the CCA. [Twp MSD, Ex D, Interlocal Agreement, as amended in 2003].

> Here, the alleged wrong occurred when the City and Township wrote the letters to the CCA directing the CCA to terminate plaintiff allegedly in retaliation for his protected activity. In other words, while damages resulted when plaintiff received the letter, the wrong upon which plaintiff's claim is based occurred when the City and Township terminated plaintiff in retaliation for his protective activity – i.e., March 11, 2014 [the date of the Township's letter] and March 20, 2014 [the date of the City's letter]. Therefore, plaintiff was required to commence his WPA action within 90 days of those dates. Plaintiff failed to do so. [*Millar, supra* at p6.]

The Court of Appeals also rejected the Plaintiff's argument that equitable tolling should apply because he did not receive the Township's letter (or CCA's letter) on the date it was written, stating: "Here, there were no allegations of fraud or mutual mistake. The record does not support that CCA, the City or the Township intentionally held the letters to cause undue delay or to 'run out the clock.'" *Millar, supra* at p6.

Additionally, the Court of Appeals held that, under binding Michigan case law, the Plaintiff's wrongful termination/violation of public policy claim was preempted by the WPA because both claims arose from "the same alleged wrongful conduct – i.e., retaliatory termination for reporting various code violations." *Millar, supra* at p7-8.

Contrary to Plaintiff's representations in his Application to this Court, the Court of Appeals did not make a finding or decision on the merits "that all Defendants overlapped and intersected to the extent that each was liable for the others' actions," nor is it accurate for Plaintiff to contend that "no Defendant disputed" this to be true in this case. [Plf Application, p3]. Nowhere in the Court of Appeals' unpublished opinion does it state that the Court is making a finding that each Defendant was jointly liable for the others' actions. Rather, the Court of Appeals noted that the City and Township's summary disposition motions did not contain a challenge to the Plaintiff's assertion that they were employers for purposes of applying the WPA. *Millar, supra* at pp5, 8. Stated

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another way, when the Township moved for summary disposition of Plaintiff's WPA claim on the basis of being time-barred by the applicable 90-day statute of limitations, the Township's argument assumed - for the purposes of argument only - that the WPA applied to the Township as an employer. The Plaintiff cannot stretch the Township's assumption for the sake of one argument in its summary disposition motion into a tacit approval that it is liable for others' actions in this case.

Similarly, Plaintiff's Application asserts that the Court of Appeals made a finding or decision on the merits that all three Defendants were "one-in-the-same for purposes of the WPA." [Plf Application, p2]. This is also inaccurate in several aspects. The Court of Appeals' stated, in discussing Plaintiff's civil conspiracy claim, that: "However, because plaintiff alleged that the three entities were one-in-the-same for purposes of the WPA, plaintiff cannot show that there were three separate entities that conspired together to terminate him." *Millar, supra* at p8. A plain reading of this sentence reveals that the Court of Appeals was not making a finding as a matter of law that the three Defendants were "one-in-the-same for purposes of the WPA." Rather, the Court of Appeals was drawing a comparison between *the Plaintiff's allegation that* Defendants were one-in-the-same for purposes of his WPA claim, and *the Plaintiff's allegation that* Defendants were three separate entities for purposes of his civil conspiracy claim.

As argued in more detail below, the issues in this case do not merit this Court's review under MCR 7.305(B).

The narrow grounds upon which this Court will grant leave to appeal are currently set forth in MCR 7.305(B) [formerly found at MCR 7.302(B)]. "The grounds reflected in MCR 7.302(B) [now found at MCR 7.305(B)] reflect a basic policy of the Supreme Court

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that energies should be devoted to reviewing important matters and policing the administration of the judicial system, rather than be dissipated in attempts to correct every possibility of error in the decisions of the lower courts. . . . Therefore it should not be assumed that leave to appeal will be routinely granted in every case that might come under one of the specified grounds." 6 Longhofer, Michigan Court Rules Practice (4th ed), p472.

Plaintiff-Appellant Bruce Millar ("Plaintiff") contends that leave to appeal in this case is justified under MCR 7.305(B)(2), (B)(3), (B)(5)(a), and (B)(5)(b), which state in relevant part:

> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
>
> (3) the issue involves a legal principle of major significance to the state's jurisprudence;
> * * *
> (5) in an appeal of a decision of the Court of Appeals,
> (a) the decision is clearly erroneous and will cause material injustice, or
> (b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals[.]

First, although this case involves a subdivision of the State (Elba Township), Plaintiff's issues presented on appeal do have not "significant public interest" that pertains especially to a subdivision of the State. Stated another way, while Plaintiff's WPA claim happens to be against a subdivision of the State, the issue of whether Plaintiff timely filed his WPA lawsuit is not dependent upon the identity of a defendant as a subdivision of the State. Further, the issue of whether Plaintiff timely filed his WPA claim primarily interests these litigants, and is not a "significant public interest."

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Second, while Plaintiff claims that this case involves a legal principle of major significance concerning the accrual of his claim under the WPA, the Court of Appeals' unpublished opinion properly applied the express language of the WPA and binding accrual case law to the factual record of this case. The disputed issue of whether Plaintiff's WPA action is time-barred under MCL 15.363(1) primarily interests only these litigants.

Third, the Court of Appeals' unpublished opinion in this case was not clearly erroneous and will not cause material injustice. The Court of Appeals cited and applied the correct standard of review, and cited and applied the correct statutory and precedential case law to the record facts at issue. Indeed, a material injustice would occur to Elba Township if it were required to defend against a time-barred WPA claim and wrongful termination/violation of public policy claim that is pre-empted (and arguably barred by governmental immunity).

Also, the Court of Appeals' unpublished opinion in this case is not binding precedent, see MCR 7.215(C)(1), and it does not conflict with a decision of this Court or another decision of the Court of Appeals.

Lastly, the trial court did not issue a ruling on Plaintiff's request to amend his complaint at the time of the summary disposition hearing, and whether or not the trial court should have granted Plaintiff permission to file a first amended Complaint was not an issue presented by the Plaintiff in the Court of Appeals; thus, that issue is not preserved here.

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This Court need not exercise its discretion to grant leave under MCR 7.305(B) and Elba Township respectfully requests that this Court deny Plaintiff's request for leave to appeal from the unanimous unpublished Court of Appeals opinion.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Plaintiff's "Statement of Undisputed Facts" includes references to facts purportedly contained in certain discovery responses or requests for admissions that were neither exhibits to, nor referenced in, either Elba Township's motion for summary disposition or Plaintiff's response to that motion. As a result, the discovery responses mentioned in Plaintiff's "Statement of Undisputed Fact" also do not appear to have been part of the trial court's consideration in ruling on the motions for summary disposition.[See, 3/2/15 Trans.] Plaintiff's Application acknowledges this at p9, fn7.

Plaintiff's "Statement of Undisputed Facts" also does not fairly state all material facts without argument or bias, as required under MCR 7.212(C)(6), MCR 7.302(A)(1)(d). Therefore, Elba Township set forth the following Counter-Statement of Facts and Proceedings.

A. FACTS

Elba Township is a municipal entity located in the southwest portion of Lapeer County. The Township is one of 25 different participating municipalities to an "Interlocal Agreement" that established the Construction Code Authority (CCA) in or about 1994, under the Michigan Urban Cooperation Act of 1967, MCL 124.501 et. seq. [Twp MSD, Ex D, Interlocal Agreement, as amended in 2003]. The purpose of establishing the CCA was, among other things, to "administer and enforce certain construction codes and other ordinances adopted by each of the participating municipalities." [Twp MSD, Ex D,

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Interlocal Agreement, Section 1-Establishment]. Each of the 25 participating municipalities has a CCA representative. The CCA representatives elect a five-person Board of Directors of the CCA, and the Board of Directors "have the power to conduct day-to-day business of the [CCA]." [Twp MSD, Ex D, Interlocal Agreement, Section 2-Organization].

Plaintiff's Complaint asserts that he is employed, at-will, as a plumbing, mechanical and/or fire inspector by the CCA. [Complaint ¶1 and ¶9; Complaint, Ex B, CCA Employee Manual, final page]; that he holds licenses issued by the State of Michigan in this regard [Complaint ¶8; Complaint, Ex A, licenses]; and that he has "conducted numerous commercial and residential inspections in Imlay City and Elba Township." [Complaint, ¶12].

The CCA Building Official determines the work schedule for the inspectors "as to office hours and scheduled inspections." [Complaint, Ex B, CCA Employee Manual, p10].

Plaintiff's Complaint further alleges that Elba Township and the CCA "have often collectively circumvented and/or 'overruled' Plaintiff's counsel, findings and decisions." [Complaint, ¶17]. The Complaint cites one of example of this involving a violation notice he sent in May 2011 (about 3 years before the Township issued its March 11, 2014 letter) to the Elba Township Supervisor regarding a sanitary sewer correction at the Fire Hall. [Complaint, ¶17(a)].

On March 11, 2014, the Elba Township Supervisor issued a letter to Mr. Hayes, the director/code official of the CCA, advising:

> A discussion was held at the Elba Township General Board meeting held on March 10th concerning issues and complaints with Construction Code

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> Authority. As a result of these discussions and the long term relationship with CCA a decision was made that a change was needed. It was a unanimous decision to contact you, as the director/code official, and formally request that Bruce Millar no longer perform inspections within Elba Township. I understand that CCA already has additional certified inspectors in this area so this should not require additional staff. If you have any questions, please feel free to contact me. [Complaint, Ex D, 3/11/14 Twp Ltr; see also, Complaint ¶17(a), ¶19].

On March 20, 2014, the City Manager of Imlay City issued a similar letter to Mr. Jarvis, chairman of the CCA, requesting that Plaintiff "not do inspections in the community effective immediately." [Complaint, Ex D, 3/20/14 City Ltr].

On March 27, 2014, Mr. Jarvis of CCA issued a letter to the Plaintiff stating:

> Please be advised that I have recently been notified by both Elba Township and Imlay City. I regret to inform you that they no longer wish for you to act as their plumbing and mechanical official and request that you immediately cease conducting all mechanical and plumbing inspections within their communities.
>
> As Lonnie [Hayes] is now on vacation until April 7, 2014, and therefore unable to handle this administratively, it has been put upon me to inform you that your services are no longer needed within the Township limits of Elba or within the City limits of Imlay City.
>
> You, as well as your knowledge and expertise are extremely valuable to our organization. I am confident we can all proceed and continue to work together in a professional manner as your employment continues with this company and for the remaining municipalities it represents.
> If you wish for copies of the letters received, please advise Lonnie [Hayes] upon his return. [Complaint, Ex C, 3/27/14 CCA Ltr; see also, Complaint ¶18].

Plaintiff's Complaint alleges that he received the March 27, 2014 letter "no sooner than March 28, 2014, and likelier the following Monday, March 31, 2014," and that he later requested and separately obtained the Elba Township and Imlay City letters to CCA. [Complaint ¶27-¶28].

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Plaintiff subsequently attested in an Affidavit in the trial court dated February 13, 2015, that the March 27 letter was hand-delivered to him on March 31, 2014, after he asked the CCA's deputy zoning administrator why he was not being assigned to continue work on a job in Imlay City. [Plf Resp to Twp's MSD, Ex A, 2/13/15 Millar Affidavit]. Whereas Plaintiff's Application asserts as fact that Plaintiff worked through March 27 in Imlay City before returning to CCA's offices on March 31, 2014 [Plf Application, p10], his Affidavit merely states that he had been working in Imlay City on March 27, 2014, and was hand-delivered the March 27, 2014 letter on March 31, 2014. [Plf Resp to Twp's MSD, Ex A, 2/13/15 Millar Affidavit, ¶1].

B. TRIAL COURT PROCEEDINGS

Plaintiff's Complaint was filed in Lapeer County Circuit Court on June 26, 2014, alleging three counts: Count I – Violation of Michigan Whistleblowers Protection Act; Count II – Wrongful Termination; and Count III – Civil Conspiracy. [Register of Actions; Complaint].

Regarding the WPA and wrongful termination/violation of public policy claims, Plaintiff's Complaint alleges that, based on Imlay City and Elba Township's alleged "high degree of control over [the CCA]," he may be considered an employee of Imlay City and Elba Township for purposes of the Michigan Whistleblowers Protection Act and wrongful termination analysis. [Complaint, ¶24, ¶34]. The Complaint asserts that he was allegedly unlawfully terminated from working in the jurisdiction of Elba Township and Imlay City in retaliation for "indicating his intentions to report and/or reporting violations of building codes, regulations, rules and statutes in accordance with his responsibilities as an employee and as a licensed [inspector]." [Complaint ¶25, ¶35].

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Plaintiff's Complaint also alleges a claim for civil conspiracy, asserting that Elba Township, Imlay City, and the CCA "agreed and/or planned to engage in conduct violating Plaintiff Millar's rights, including but not limited to those set forth in [the WPA] and protections from wrongful discrimination, including termination, in violation of the public interest." [Complaint ¶41].

On January 12, 2015, after a period of discovery, Imlay City filed a Motion to Dismiss, seeking summary disposition of the Plaintiff's claims against it under MCR 2.116(C)(7) and MCR 2.116(C)(8), for the following reasons: (1) the WPA claim was barred by the applicable 90-day statute of limitations, (2) the WPA's exclusive remedy provision barred the wrongful termination claim, and (3) the wrongful termination and civil conspiracy tort claims were barred by governmental immunity. [Register of Actions; Imlay City MSD].

On February 2, 2015, Elba Township filed a Motion for Summary Disposition under MCR 2.116(C)(7) and (C)(8), seeking summary disposition in its favor on the basis of the same three reasons argued in Imlay City's Motion to Dismiss. [Register of Actions; Elba Twp. MSD]. Specifically, Elba Township argued that under MCL 15.363(1), a civil action under the WPA must be brought "within 90 days after the occurrence of the alleged violation of this act." Plaintiff's Complaint alleges that Elba Township violated the WPA by requesting that Plaintiff not perform any more inspections in Elba Township, via the Township's March 11, 2014 letter to the CCA. [Complaint, ¶17(a), ¶19, ¶28]. Plaintiff's Complaint, however, was not filed until 107 days after the Township's March 11, 2014 letter to the CCA. Because Plaintiff's

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Complaint was filed beyond the applicable 90-day statute of limitations, his WPA claim was time-barred. [Elba Twp MSD, pp2, 4-5].

Further, Elba Township argued in its Motion for Summary Disposition that the WPA's exclusive remedy provision pre-empted Plaintiff's common law public policy claim arising from the same activity because, under Michigan law, a claim for wrongful retaliatory discharge based on public policy is not sustainable where an applicable statutory prohibition exists against a discharge in retaliation for the conduct at issue, such as the WPA. In such cases, the WPA will provide the exclusive remedy. *Dudewicz v Norris Schmid, Inc*., 443 Mich 68, 78-80 (1993), overruled in part on other grounds by *Brown v Detroit Mayor*, 478 Mich 589, 595, n2 (2007). Because the WPA proscribes the retaliatory discharge alleged by Plaintiff for his reporting to public bodies of violations or suspected violations of the law, the WPA provides the exclusive remedy and a public policy claim is not sustainable. [Elba Twp MSD, pp5-6].

Additionally, Elba Township argued that the Plaintiff's wrongful termination claim (Count II) and civil conspiracy claim (Count III) were barred by operation of governmental immunity provided under MCL 691.1407(1), because the Township is a governmental agency and it was engaged in the exercise or discharge of a governmental function when it participated in the "Interlocal Agreement" for carrying out the administration and enforcement its ordinances relating to mechanical, building, and zoning. [Elba Twp MSD, pp6-8].

On February 9, 2015, CCA also filed a Motion for Summary Disposition under MCR 2.116(C)(7) and (C)(8). CCA's arguments mirrored those set forth in Imlay City and Elba Township's respective motions. [Register of Actions; CCA MSD].

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On February 13, 2015, Plaintiff filed his joint response in opposition to Imlay City and Elba Township's motions, arguing that: (1) his Complaint was filed within 90 days of when he received the CCA's March 27, 2014 letter, and therefore his WPA claim was not time-barred; (2) his WPA claims were not exclusive because it did not turn on a single set of violative circumstances, and (3) his wrongful termination and civil conspiracy claims were not barred by governmental immunity because MCL 691.1407(1) did not protect Imlay City or Elba Township from the conduct alleged in Plaintiff's Complaint. [Plf Resp. to City and Twp. MSD; Register of Actions].

On February 25, 2015, Plaintiff filed his response to CCA's motion, generally making the same arguments stated in opposition to the dispositive motions made by Imlay City and Elba Township. [Plf Resp. to CCA MSD; Register of Actions].

On February 27, 2015, Imlay City filed a Reply Brief, arguing that there was no intentional tort or conspiracy exception to governmental immunity for a governmental agency, that the activity alleged in Plaintiff's Complaint was within the auspices of the WPA and therefore the Plaintiff's exclusive remedy, and that the WPA claim was time-barred because it was not filed within 90 days of Imlay City's alleged wrongful act (i.e., asking CCA to not have Plaintiff conduct any further inspections in the City, per the City's March 20, 2014 letter). [Imlay City Reply Brief; Regster of Actions].

On March 2, 2015, the trial court heard oral arguments on all defense motions for summary disposition. [Register of Actions; 3/2/15 Trans.].

The trial court granted summary disposition of the Plaintiff's WPA claim because it was time-barred, stating in relevant part:

> Here, viewing the evidence in the light most favorable to the Plaintiff, the last alleged violation of the WPA, if any, occurred when the Construction

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> Code Authority notified the Plaintiff in writing on March 27, 2014, that neither Elba Township nor Imlay City wished to have the Plaintiff serve as an inspector within their respective jurisdictions.
>
> Plaintiff does not allege any further violations of the WPA by the Defendants after that date. Consequently, the 90-day limitation period began to run March 27, 2014. This means Plaintiff had until June 25, 2014 to file his lawsuit. However, as previously stated, the Plaintiff did not initiate the present action until June 26, 2014. Plaintiff's WPA claim, therefore, is untimely and dismissal is warranted. [3/2/15 Trans, pp11-12].

The trial court rejected Plaintiff's argument that the statute runs as of the date of his receipt of the letter, stating that, under the unambiguous language of the WPA, which requires claims to be made within 90 days after the occurrence of the alleged violation of the act, that: "Plaintiff's receipt of the Construction Code Authority's letter cannot reasonably be considered the occurrence of the alleged violation. Accordingly, Plaintiff's conclusion that his receipt of the letter triggered the statute of limitations is inconsistent with the language of the statute which places the focus on the time of the alleged discriminatory act." [3/2/15 Trans, p12].

The trial court also granted summary disposition of the Plaintiff's wrongful termination count because it was barred by the exclusive remedy provision of the WPA. [3/2/15 Trans, pp12-14]. The trial court stated in relevant part:

> In the present case, a review of the Plaintiff's complaint reveals that the Plaintiff's wrongful termination claim flows from the same circumstances surrounding his WPA claim. Therefore, consistent with case law, the WPA precludes Plaintiff's claim for wrongful termination in violation of public policy. [3/2/15 Trans, p14]

Lastly, the trial court granted summary disposition as to the civil conspiracy count because a civil conspiracy claim requires demonstration of some underlying tortious conduct, and the court had dismissed the underlying claims. The trial court stated:

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"Because Plaintiff's WPA and wrongful termination claims are dismissed, Plaintiff's civil conspiracy claim is also dismissed." [3/2/15 Trans, pp14-15].

At the oral argument, Plaintiff's counsel stated that: "Should the Court feel that the complaint is not sufficient, we ask, of course, for leave to amend." [3/2/15 Trans, p6]. The trial court did not expressly address that request, but implicitly denied it by granting summary disposition in favor of the Defendants. [3/2/15 Trans, p15].

On March 19, 2015, an Order consistent with the trial court's ruling was entered and closing the case. [3/19/15 final order].

C. COURT OF APPEALS PROCEEDINGS.

Following the trial court's March 19, 2015 dismissal order, Plaintiff filed a timely claim of appeal as a matter of right in the Court of Appeals. On appeal, Plaintiff raised three "Statement of Questions Involved" concerning: (1) Whether or not Defendants established that his WPA claim was time-barred when he filed it within 90 days after the date he received CCA's letter; (2) Whether or not Defendants established that his wrongful termination claim was preempted by the WPA and/or barred by governmental immunity; and (3) Whether or not Defendants established that Plaintiff failed to state claim for which relief could be granted on his civil conspiracy claim. [COA Appellant Brief, p1].

Following the completion of briefing, the Court of Appeals held oral arguments on May 11, 2016. On August 4, 2016, the Court of Appeals issues a unanimous unpublished per curiam opinion affirming the trial court's grant of summary disposition to all Defendants on all claims. *Millar, supra* at pp1, 8.

Plaintiff timely filed the instant Application for Leave to Appeal.

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ARGUMENT

I. NEITHER THE TRIAL COURT NOR THE COURT OF APPEALS ERRED IN CONCLUDING THAT PLAINTIFF'S WPA CLAIM ACCRUED AGAINST ELBA TOWNSHIP ON MARCH 11, 2014; THUS, PLAINTIFF'S WPA CLAIM AGAINST ELBA TOWNSHIP WAS TIME-BARRED BECAUSE HE DID NOT FILE IT "WITHIN 90 DAYS AFTER THE OCCURRENCE OF THE ALLEGED VIOLATION OF [THE WPA]"

A. Standard of Review:

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Anzaldua v Neogen Corp,* 292 Mich App 626, 629 (2011). "Absent a disputed question of fact, the determination whether a cause of action is barred by a statute of limitation is a question of law that this Court reviews de novo." *Id.* at 629-630, quoting *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 638 (2004).

Elba Township's Motion for Summary Disposition was brought in the trial court under MCR 2.116(C)(7) and (C)(8). A motion for summary disposition under MCR 2.116(C)(7) may be brought where a claim is precluded by the statute of limitations. "When reviewing a motion under MCR 2.116(C)(7), a reviewing court must consider all affidavits, pleadings, and other documentary evidence submitted by the parties and construe the pleadings and evidence in favor of the nonmoving party." *Anzaldua,* 292 Mich App at 629.

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings. *Johnson-McIntosh v City of Detroit*, 266 Mich App 318, 322 (2005). The pleadings are considered alone, absent consideration of supporting evidence. MCR 2.116(G)(5); *Dolan v Continental Airlines*, 454 Mich 373, 380-381 (1997). A motion under this subrule should be granted where the claim is so clearly

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unenforceable as a matter of law that no factual development could justify a right to recovery. *Beaudrie v Henderson*, 465 Mich 124, 130 (2001).

B. Under the plain language of MCL 15.363(1), and this Court's accrual analysis in *Joliet v Pitoniak,* the 90-day statute of limitations began to run for Plaintiff's WPA claim against Elba Township on March 11, 2014, even if his last day of working in Elba Township was March 27, 2014.:

One issue in this case concerns when the WPA's 90-day statute of limitations began to run for Plaintiff's claim against Elba Township and the other Defendants.

1. The plain language of MCL 15.363(1).

The WPA states in relevant part:

> **A person who alleges a violation of this act may bring a civil action** for appropriate injunctive relief, or actual damages, or both **within 90 days after the occurrence of the alleged violation of this act**. [MCL 15.363(1) (emphasis added)].

"When interpreting a statute, this Court must, of course, identify and give effect to the Legislature's intent. The most reliable indicator of the Legislature's intent is the language of the statute itself. If the statutory language clearly and unambiguously states the Legislature's intent, then further judicial construction is neither required nor permitted, and the statute must be enforced as written." *Wurtz v Beecher Metro. Dist.*, 495 Mich 242, 250 (2014), citing *Whitman v City of Burton,* 493 Mich 303, 311 (2014).

The WPA's requirement for actions to be brought within 90 days of the alleged occurrence is mandatory, not permissive. *Covell v Spengler,* 141 Mich App 76, 80 (1985). Where a plaintiff fails to file his cause of action under the WPA within 90 days of the occurrence of the alleged violation, the claim is time-barred. *Id.*

"Statutes of limitations 'serve the permissible legislative objective of relieving defendants of the burden of defending claims brought after the time so established.'"

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Trentadue v Buckler Lawn Sprinkler, 479 Mich 378, 404 (2007), quoting *O'Brien v Hazelet & Erdal,* 410 Mich 1, 14 (1988). A statute of limitations is designed to provide a defendant with a sense of security that "[a]t some point a person is entitled to put the past behind him and leave it there." *Id.* at 404, fn22, quoting *Stephens v Dixon*, 449 Mich 531, 536 (1995).

Plaintiff's Complaint alleges Elba Township retaliated against him by terminating his plumbing, mechanical and/or fire inspection services in the Township. [Complaint ¶25-¶26]. This is the wrongdoing or retaliatory action upon which Plaintiff's WPA claim against Elba Township is based.

Elba Township made the decision to "formally request that Bruce Millar no longer perform inspections within Elba Township" during an Elba Township General Board Meeting held on March 10, 2014, and Elba Township conveyed this request to Mr. Hayes, the CCA Building Official, via a March 11, 2014 letter. [Complaint, Ex D, 3/11/14 Twp Ltr]. The CCA Building Official determines the work schedule for the inspectors "as to office hours and scheduled inspections." [Complaint, Ex B, CCA Employee Manual, p10].

Despite Plaintiff's efforts to raise questions of fact regarding when the Township's March 11, 2014 letter was written, or when it was transmitted to Mr. Hayes at the CCA, it is clear that the letter was written and transmitted to the CCA by the time the CCA wrote its March 27, 2014 letter to the Plaintiff, advising him that he would no longer be scheduled to perform inspections in Elba Township, per the Township's request. [Complaint, Ex C, 3/27/14 CCA Ltr].

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Plaintiff argues that the "occurrence of violation of the WPA" that should trigger the 90-day statute of limitations for all three Defendants under MCL 15.363(1) is the date when the CCA handed him its March 27, 2014 letter.

Plaintiff's argument, however, is contrary to the WPA's plain language that a civil action must be brought "within 90 days after the occurrence of the alleged violation of this act." MCL 15.363(1). In order for Plaintiff's argument to hold water, the Court would have to read words into MCL 15.363(1) that suit must be brought within 90 days *after the Plaintiff's notification* of the occurrence of the alleged violation of this act. This would run contrary to the rules of statutory construction, "[t]he foremost of which is to discern and give effect to the Legislature" by "examining the most reliable evidence of that intent, the language of the statute itself." *Whitman,* 493 Mich at 312. It is the plain language of the statute that controls. *Id.* at 306. "The Legislature is presumed to have intended the meaning it plainly expressed." *Griswold Properties, LLC v Lexington Ins. Co.,* 276 Mich App 551, 564 (2007). "A court cannot read into a clear statute that which is not within the manifest intention of the Legislature as derived from the language of the statute itself." *Id.*

This Court should decline to read words into MCL 15.363(1) and reject Plaintiff's argument that he should have 90 days from notification of the occurrence of Elba Township's alleged violation of the WPA to file suit.

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2. Analysis under *Joliet v Pitoniak.*

Plaintiff's Application also criticizes the Court of Appeals for relying "entirely on a single decision of this Court, *Joliet v Pitoniak* . . ."[2] [Plf Application, p15].

The Court of Appeals began its analysis of the WPA limitations issue by quoting MCL 15.362, quoting the three prima facie elements of a WPA claim set forth by this Court in *Wurtz,* 495 Mich at 251-252, and quoting the provision in MCL 15.363(1) that a person alleging a violation of the WPA has "90 days after the occurrence of the alleged violation of this act" to file suit. *Millar, supra* at p5. In doing so, the Court of Appeals noted that the WPA's protections are only afforded to an employer's employee, but because Elba Township and Imlay City's dispositive motions did not contain a challenge to Plaintiff's assertion about being their employee, the WPA claim was reviewed without analyzing that element, or the other two elements of the Plaintiff's WPA claim[3], and instead focused on whether Plaintiff filed his WPA claim within 90 days after the occurrence of each Defendant's alleged violation of the act. *Millar, supra* at p5.

The Court of Appeals then went on to discuss the claim accrual issue addressed by this Court in *Joliet v Pitoniak,* 475 Mich 30 (2006). The Court of Appeals pointed out that in *Joliet*, the accrual of that plaintiff's claim under analogous civil rights law was

[2] Plaintiff's Application makes derogatory inferences that where a court relies on a "single case" regarding an issue then the court is providing an inferior analysis of the issue. Plaintiff, however, cites no authority for his inference. Furthermore, it makes logical sense that in circumstances where a single case is controlling or the most analogous or persuasive authority, the court will rely on that single case.

[3] Plaintiff's Application argues that Elba Township's motion for summary disposition, which assumed arguendo that Millar was an employee for purposes of analyzing the 90-day limitations period in MCL 15.363(1), only, equates to a concession that the Township is liable for other Defendants' actions. [Plf Application, p3]. This is an overly broad correlation, which the Township disputes as inaccurate and untrue in the form and manner alleged by the Plaintiff.

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measured by “the time the wrong upon which the claim is based *was done* regardless of the time when damage results.” *Millar, supra* at p5, quoting *Joliet,* 475 Mich at 36 (emphasis in original). The Court of Appeals further noted that under *Joliet*, “it is the *employ[er’s]* wrongful act that starts the period of limitations. . . “ *Millar, supra* at p5, quoting *Joliet*, 475 Mich at 41. The Court of Appeals went on to reject Plaintiff’s argument that his claim accrued on March 31, 2014, when he received the CCA’s letter, stating:

> [A] claim accrues at "the time the wrong upon which the claim is based was done regardless of the time when damage results." *Joliet*, 475 Mich at 36. Here, the alleged wrong occurred when the City and Township wrote the letters to the CCA directing the CCA to terminate plaintiff allegedly in retaliation for his protected activity. **In other words, while damages resulted when plaintiff received the letter, the wrong upon which plaintiff's claim is based occurred when the City and Township terminated plaintiff in retaliation for his protected activity—i.e. March 11, 2014 and March 20, 2014. Therefore, plaintiff was required to commence his WPA action within 90 days of those dates. Plaintiff failed to do so**. Instead, plaintiff filed his complaint on June 26, 2014, 107 and 98 days respectively after the allegedly wrongful conduct took place. Moreover, even if we were to assume that CCA's conduct was the allegedly wrongful conduct that commenced the 90-day clock, plaintiff filed his complaint 91 days after CCA's alleged wrongful act—i.e. termination of plaintiff's assignments in the City and the Township on March 27, 2014. *Id.* [*Millar, supra* at p6 (bold emphasis added)].

Plaintiff argues that the Court of Appeals erred in relying on *Joliet* because the accrual issue in *Joliet* concerned the three year limitations period applicable to claims under Michigan’s Elliott-Larsen Civil Rights Act (ELCRA), and not the 90-day limitations period found in the WPA. [Plf Application, p17]. Yet, the case law advanced in support of the Plaintiff’s argument for a March 31, 2014 accrual also relies on analogous precedent arising under civil rights law.

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For example, Plaintiff cites *Niezgoski v Quality Home Care, Inc.,* unpublished per curiam opinion of the Michigan Court of Appeals issued Jan. 27, 2005 (Docket No. 250385) (copy attached as **Ex B**), as support for the proposition that his WPA claim accrues when the adverse action is made *and* communicated to the worker. [Plf Application, p16]. While *Joliet* is a published opinion of this Court, *Niezgoski* is an unpublished 2 to 1 Court of Appeals per curiam opinion that is not binding precedent. MCR 7.215(C)(1).

In *Niegzgoski,* the plaintiff was let go from her employment in January 2003 with a written explanation citing lack of hours available. *Id.* at p2. In April 2003, the plaintiff called to ask if there were hours available for her yet, and was informed she would not be hired back regardless of available hours. She filed suit under the WPA in May 2003. *Id.* The *Niegzgoski* Court held that the plaintiff's 90-day clock began in January 2003, when she was let go from her employment, and therefore her complaint was filed too late. *Id.* In reaching that conclusion, the Court cited and relied on two cases involving accrual of claims under the ELCRA: *Parker v Cadillac Gage Textron, Inc*, 214 Mich App 288 (1995) (ELCRA claim accrued on last day plaintiff worked and not a later effective date of separation designated by the employer), and *Collins v Comerica Bank,* 468 Mich 628 (2003) (where no decision had yet been made as to the plaintiffs' employment status on their last day worked, ELCRA claim accrued when plaintiffs were notified of their discharge).

Further, *Niezgoski* is factually distinguishable from the instant case because there is nothing in the facts of that case to suggest in that the date of the employer's

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written separation letter was different than the date the *Niezgoski* plaintiff claimed to have been notified of her separation from employment.

Plaintiff also cites *Delaware State College v Ricks,* 449 US 250, 101 S.Ct 498, 66 L.Ed.2d 431 (1980) to advance his argument that his WPA accrued when he received CCA's letter. *Ricks* involved an allegation of employment discrimination on the basis of national origin, brought under Title VII of the Civil Rights Act of 1964. *Id.* at 254. In *Ricks,* the issue before the US Supreme Court required it "[t]o identify precisely the 'unlawful employment practice' of which [the plaintiff] complains" to determine the timeliness of *Ricks*' EEOC complaint and subsequent Title VII lawsuit. *Id.* at 257. The *Ricks* Court held that, "[T]he only alleged discrimination occurred -- and the filing limitations periods therefore commenced -- at the time the tenure decision was made and communicated to Ricks [footnote omitted]. That is so even though one of the effects of the denial of tenure -- the eventual loss of a teaching position -- did not occur until later." *Id.* at 258.

Similar to the circumstance in *Ricks,* however, here, Plaintiff's allegation that Elba Township violated the WPA stems from the Township's request that the CCA Building Official stop scheduling Plaintiff for inspections in the Township. That occurred with the Township's March 11, 2014 letter, although the effects of the Township's conduct in making that request did not occur until later.

In *Ricks,* the US Supreme Court also rejected any continuing-violation theory "[b]ecause of the absence of any allegations of facts to support it." *Ricks,* 449 US at 259. In the case at bar, Plaintiff acknowledges that he is not advancing any continuing-violation theory. [Plf Application, pp16-17].

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Although Plaintiff criticizes the Court of Appeals' reliance on *Joliet*, the US District Court for the Eastern District of Michigan has also relied on *Joliet* in deciding when the 90-day limitations period ran on a claim under the WPA. In *Foster v Judnick,* 963 F Supp 2d 735 (ED Mich.2013), the federal district court held that the plaintiffs "[f]ailed to point to an adverse action within the time frame" under MCL 15.363(1), and therefore the plaintiffs' WPA claim could not survive. *Id.* at 763. In reaching that conclusion, the federal district court cited *Joliet* for the proposition that, "The statute of limitations accrues when the employer commits the wrongful act, not when she suffered the damage." *Foster,* 963 F Supp 2d at 763, citing *Joliet*, 475 Mich at 39-41.

Plaintiff's circumstances are akin to those in *Joliet*. In that case, the adverse employment action did not coincide with the date of termination of the plaintiff's employment. *Joliet,* 475 Mich at 37. The *Joliet* Court held that accrual under the three-year statute of limitations applicable to the plaintiff's ELCRA claim is measured by "the time the wrong upon which the claim is based was done regardless of the time when damage results." *Joliet,* 475 Mich at 36, citing MCL 600.5827 ("Except as otherwise provided, the period of limitations runs from the time the claim accrues. The claim accrues . . . at the time the wrong upon which the claim is based was done regardless of the time when damage results."). Therefore, while the *Joliet* plaintiff's last day of work was within three years of filing her lawsuit, the last date of the *Joliet* defendant's alleged wrongdoing was more than three years before her lawsuit was filed, therefore her claim was barred by the statute of limitations. *Id.* at 44-45.

Here, the "wrong upon which" the Plaintiff's WPA claim against Elba Township is based on Elba Township's request to have the CCA stop scheduling the Plaintiff to

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perform inspections in the Township. [Complaint, ¶17(a), ¶¶28-29]. Elba Townsihp's request was made March 11, 2014. [Complaint, Ex D, 3/11/14 Twp Ltr]. Therefore, Elba Township's alleged violation of the WPA occurred more than 90 days before he filed his lawsuit. His WPA claim is time-barred.

Plaintiff's Application also asserts that the Court of Appeals failed or refused to address certain appellate opinions issued after Plaintiff's Complaint was filed. [See, Plf Application, p6, fn6]. Plaintiff's brief on appeal in the Court of Appeals, however, did not even cite or address any of those cases, yet the Court of Appeals' opinion does cite to one of those cases, *Wurtz v Beecher Metro. Dist. See, Millar, supra* at p6.

Although *Wurtz* involved analysis under the WPA, the issue before this Court in *Wurtz* did not concern the 90-day limitations period. Rather, the issue concerned whether "[a] contract employee whose term of employment has expired without being subject to a specific adverse employment action identified in the WPA and who seeks reengagement for a new term of employment occupies the same legal position as a prospective employee," because "[t]he WPA, by its express language, only applies to current employees; the statute offers no protection to prospective employees." *Wurtz*, 495 Mich at 244.

Similarly, in *Smith v City of Flint*, 313 Mich App 141 (2015), although the plaintiff's claim arose under the WPA, the issue before the court did not concern the 90-day limitations period. Instead, the dispute concerned whether the plaintiff police officer's reassignment to a different part of the city violated the WPA *Id.* at 143-144, 151. Moreover, the issues on which this Court scheduled oral argument on whether to grant the application or take other action in *Smith v City of Flint (***Ex D,** 6/10/16 Order,

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Docket No. 152844) also did not involve the accrual of the plaintiff's WPA claim or application of the 90-day statute of limitations under MCL 15.363(1).

The Court of Appeals did not err in applying *Joliet*'s analysis to conclude that Plaintiff's WPA claim against Elba Township is time-barred.

3. Plaintiff's work at Elba Township after March 11, 2014.

Plaintiff argues that his WPA claim Elba Township could not accrue as of the date of the Township's March 11 2014 letter to the CCA because the Township did not transmit that decision or stop him from perform inspections through March 17, 2014. [Plf Application, pp15, 21].

First, Elba Township's March 11, 2014 letter was transmitted timely to the CCA Building Official (who is the person in charge of scheduling work for the Plaintiff), as evidenced by the CCA's subsequent March 27, 2014 letter to the Plaintiff, advising him that he would no longer be scheduled to perform inspections in Elba Township, per the Township's request. [Complaint, Ex C, 3/27/14 CCA Ltr; Complaint, Ex B, CCA Employee Manual, p10].

Second, according to Plaintiff's Affidavit, his last day of performing inspections at the Township was March 17, 2014, six days after the Township's March 11, 2014 letter. [Plf Resp to Twp MSD, Ex A, Plf Affidavit, ¶3]. This last work date is still more than 90 days before Plaintiff's lawsuit was filed, and does not alter the accrual of when the Plaintiff's WPA claim occurred for purposes of the applicable 90-day statute of limitations.

For example, in *Joliet,* the plaintiff's last day of work was within three years of filing her lawsuit, but the last date of the defendant's alleged wrongdoing was more than

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three years before her lawsuit was filed, therefore the plaintiff's claim was barred by the applicable statute of limitations. *Joliet,* 475 Mich at 44-45.

And in *Ricks,* a case cited favorably by the Plaintiff, the defendant's alleged wrongdoing occurred almost a year before the Plaintiff's last date of work, but the continued worked did not alter the accrual of his civil rights claim. *Ricks,* 449 US at 253-255, 259.

Therefore, neither the timing of transmittal of Elba Township's March 11, 2014 letter, nor Plaintiff's March 17, 2014 last work date at the Township changes the fact Plaintiff's WPA claim against Elba Township accrued more than 90 days before his lawsuit was filed. Indeed, even if the CCA's March 27, 2014 letter is the occurrence of violation of the WPA, the Plaintiff's lawsuit is still untimely. As the trial court and Court of Appeals correctly noted, the Plaintiff filed his lawsuit on June 26, 2014, which was 107 days after the Township's March 11, 2014 letter asking the CCA to stop scheduling Plaintiff's inspection services at the Township, and 91 days after the CCA's March 27, 2014 letter addressing that request; thus, Plaintiff's WPA claim was untimely and dismissal was warranted. [3/2/15 Trans, pp11-12; *Millar, supra* at p6].

4. No Court has made a finding that the Defendants are "one-in-the-same" for purposes of the WPA.

Plaintiff's Application asserts that "[t]he Court of Appeals found that Plaintiff-Applicant Millar established that Defendants CCA and member jurisdictions Imlay City and Elba Township overlapped and shared control to the extent that each was responsible for the others' actions relative to his claims." [Plf Application, p21]. This is inaccurate in several aspects. The Court of Appeals did not make a finding in this regard, but rather, mentioned that this was a theory of advanced by the Plaintiff in his

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WPA claim, and that the Plaintiff's "one-in-the-same" theory was inconsistent with his civil conspiracy claim alleging that all three Defendants acted to conspire against him. *Millar, supra* at p8.

Specifically, the Court of Appeals' stated, in discussing Plaintiff's civil conspiracy claim (not in analyzing his WPA claim): "However, because plaintiff alleged that the three entities were one-in-the-same for purposes of the WPA, plaintiff cannot show that there were three separate entities that conspired together to terminate him." *Millar, supra* at p8. A plain reading of this sentence reveals that the Court of Appeals was not making a finding as a matter of law that the three Defendants were one-in-the-same for purposes of the WPA." Rather, the Court of Appeals was drawing a comparison between *the Plaintiff's allegation that* Defendants were one-in-the-same for purposes of his WPA claim, and *the Plaintiff's allegation that* Defendants were three separate entities for purposes of his civil conspiracy claim.

Therefore, the Court of Appeals' opinion that there were three different accrual dates as against these three different Defendants is not inconsistent with the Court's analysis for dismissal of his civil conspiracy claim (which Plaintiff has not raised in his Application to this Court).

Lastly, Plaintiff's Application contains argument questioning whether a different period of limitation under MCL 600.5801 et seq applies to his WPA claim, but there has been no suggestion that a period other than the 90-day time limitation in MCL 15.363(1) applies to Plaintiff's WPA claim.

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II. Summary Disposition of Plaintiff's Claim For Wrongful Termination In Violation of Public Policy Under Was Warranted Because The WPA Provides the Exclusive Remedy.

A. Standard of Review.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Anzaldua,* 292 Mich App at 629.

B. Plaintiff's Wrongful Termination Claim is Pre-Empted.

Plaintiff's Complaint, Count II, alleges that he was "terminated from working as a plumbing, mechanical and/or fire inspector in the jurisdictions of Imlay City and Elba Township at least in part due to and in retaliation for his pattern of fairly and honestly evaluating, communicating, and meeting his legal and professional obligations to address and report violations of building codes, regulations, rules and statutes in accordance with his responsibilities as an employee and as a licensed [inspector]." [Complaint ¶35]. This is the exact same allegation he makes in support of his WPA claim. [Complaint ¶25]. The Court of Appeals did not err in stating that: "Although plaintiff argues that his public policy claim is distinct from his WPA claim and contends that the claims involve various complex factual allegations, a review of the complaint shows that the crux of both claims arise from the same alleged wrongful conduct – i.e., retaliatory termination for reporting various code violations." *Millar, supra* at p7. As a result, the Plaintiff's wrongful termination claim was pre-empted by the WPA. *Id.* at p8.

Under Michigan law, a claim for wrongful retaliatory discharge based on public policy is not sustainable where an applicable statutory prohibition exists against a discharge in retaliation for the conduct at issue, such as the WPA. In such cases, the

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WPA will provide the exclusive remedy. *Dudewicz*, 443 Mich at 78-80. In *Dudewicz*, the Supreme Court stated that:

> As a general rule, the remedies provided by statute for violation of a right having no common-law counterpart are exclusive, not cumulative. At common law, there was no right to be free from being fired for reporting an employer's violation of the law. The remedies provided by the WPA, therefore, are exclusive and not cumulative. [*Id*. at 78-79 (citations omitted).
>
> The *Dudewicz* Court also stated that:
>
> The existence of the specific prohibition against retaliatory discharge in the WPA is determinative of the viability of a public policy claim. In those cases in which Michigan courts have sustained a public policy claim, the statutes involved did not specifically proscribe retaliatory discharge. Where the statutes did proscribe such discharges, however, Michigan courts have consistently denied a public policy claim. [*Id*. at 79].

Because the WPA provided relief for the plaintiff in *Dudewicz* for reporting a co-worker's suspected violation of the law to the prosecutor's office, the Supreme Court held that the plaintiff's public policy claim was not sustainable because the WPA preempted that claim. *Id*. at 70-71, 80.

Summary disposition under MCR 2.116(C)(8) is proper where a plaintiff fails to plead or support a claim for wrongful discharge in violation of public policy that is not subject the WPA's exclusive remedy. *Anzaluda,* 292 Mich App at 636. For example, in *Anzaluda*, the plaintiff claimed that she was terminated in retaliation for her compliance with a Michigan Department of Labor deputy boiler inspector, who had come to the plaintiff's employer's business for an unannounced inspection. *Id.* at 628-629. She filed suit alleging wrongful discharge in violation of public policy. *Id.* at 629.

Thereafter, the defendant-employer moved for summary disposition, arguing that Anzaluda's claim arises under the WPA, that the WPA provided for plaintiff's exclusive

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remedy, and that the plaintiff's lawsuit was untimely because it was not filed within 90 days of her alleged retaliatory discharge. *Id.* at 629.

The plaintiff argued that she was not engaged in a protected activity for purposes of the WPA, but the trial court disagreed, and granted summary disposition to the defendant. *Id.* The Court of Appeals agreed with the trial court that summary disposition of the plaintiff's wrongful discharge claim was warranted under MCR 2.116(C)(7) because it was untimely, and also under MCR 2.116(C)(8) and (C)(10), because she failed to plead or support a claim that was not subject to the WPA's exclusive remedy. *Anzaldua,* 292 Mich App at 636.

In the instant case, in support of his wrongful termination claim (and his WPA claim), Plaintiff alleges that he was terminated from working as an inspector in Elba Township "due to and in retaliation for his pattern of fairly and honestly evaluating, communicating, and meeting his legal and professional obligations to address and report violations of building codes, regulations, rules and statutes in accordance with his responsibilities as an employee and as a licensed [inspector]." [Complaint, ¶35; see also ¶25 regarding the WPA claim]. Here, as in *Anzaluda,* because the WPA proscribes the retaliatory discharge alleged by Plaintiff for his reporting to public bodies of violations or suspected violations of the law, the WPA provides the exclusive remedy and a public policy claim is not sustainable. Therefore, as was the case in *Anzaluda* and *Dudewicz*, even if Plaintiff-Appellant Millar could properly raise a public policy claim, it is not sustainable because it is pre-empted by the WPA.

Plaintiff cites *Landon v Healthsource Saginaw, Inc,* 305 Mich App 519 (2014) as a case where the WPA did not pre-empt the asserted wrongful discharge in violation of

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public policy claim. [Plf Application, p25]. *Landon,* however, is distinguishable. There, the plaintiff reported a coworker's alleged malpractice, and not "[a] violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body. . .," as is required to make a claim under the WPA. See, MCL 15.362. *Landon,* 305 Mich App at 532-533. The Court of Appeals emphasized this important distinction, noting that if the plaintiff had been reporting a violation of an article or rule under the Public Health Code, the result would have been different. *Id.* at 532.

Here, unlike in *Landon,* Plaintiff's Complaint asserts that both his WPA claim and his wrongful discharge claim are based on reporting "violations of building codes, regulations, rules and statutes in accordance with his responsibilities as an employee and as a licensed [inspector]." [Complaint ¶25, ¶35]. Therefore, the WPA provides Plaintiff's exclusive remedy.

Pace v Edel-Harrelson, 499 Mich 1 (2016) is also not helpful to stave off dismissal of Plaintiff's wrongful discharge claim. In *Pace*, this Court held that under the plain language of MCL 15.362, the WPA provided protection to an employee who reports a violation or suspected violation of law to a public body, but not a future, planned, or anticipated act amounting to a violation or suspected violation of law. *Id*. at 2-3. Therefore, that plaintiff's WPA claim failed as a matter of law. *Id.* This Court's opinion in *Pace* did not address the merits of the plaintiff's discharge against public policy claim, but remanded that issue to the trial court in light of this Court's holding that the WPA did not apply to the plaintiff's claim. *Id.* at 10.

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Unlike the *Pace* plaintiff, here, the Plaintiff's WPA was held to be time-barred rather than failing to state a claim under the WPA. Therefore, *Pace* is distinguishable.

Additionally, while Plaintiff has argued that summary disposition of this issue was premature based on incomplete discovery, Elba Township sought summary disposition of this claim on the basis of MCR 2.116(C)(8) [Elba Twp. MSD, pp2, 6], which challenges the Complaint on its face, absent consideration of supporting evidence MCR 2.116(G)(5); *Dolan*, 454 Mich at 380-381. Therefore, the challenge to this claim under MCR 2.116(C)(8) was not premature due to incomplete factual development during discovery.

For these reasons, both the trial court and Court of Appeals correctly concluded that any alleged wrongful discharge in violation of public policy claim raised by Plaintiff is preempted by the WPA, and therefore fails to state a claim as a matter of law. [3/2/15 Trans, p14; *Millar, supra*, pp6-8].

C. Alternatively, Governmental Immunity Bars Plaintiff's Wrongful Termination Claim.

Both in the trial court and Court of Appeals, Elba Township advanced an alternative argument for dismissal of Plaintiff's claim for wrongful discharge in violation of public policy on the basis of governmental immunity under MCL 691.1407(1). This alternative argument was expressly was preserved in Elba Township's motion for summary disposition, and Appellee Brief, but neither the trial court nor Court of Appeals issued rulings based on this alternative argument, due to their dismissal of Plaintiff's wrongful discharge claim on the basis of pre-emption. [Elba Twp. MSD, pp3, 6, 8; 3/2/15 Trans, p7-15; *Millar, supra* at p8, fn1].

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A claim for wrongful discharge in violation of public policy sounds in tort, and public policy-based retaliatory based discharge constitutes an intentional tort. *Cox v E, Dep't. of Transp.,* unpublished per curiam opinion of the Michigan Court of Appeals issued Aug. 28, 2008 (Docket No. 278452) (copy attached as **Ex C)**, citing to *Dunbar v Dep't. of Mental Health*, 197 Mich App 1, 10 (1992)). There is no intentional tort exception to governmental immunity. *Smith v Dep't. of Public Health,* 428 Mich 540, 544 (1987), aff'd sub nom, *Will v Michigan Dep't. of State Police*, 491 US 58, 109 S.Ct 2304, 105 L.Ed.2d 45 (1989).

MCL 691.1407(1) provides governmental agencies with immunity from tort liability. It states: "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). "Immunity from tort liability, as provided in MCL 691.1407. . . , is expressed in the broadest possible language - it extends immunity to all governmental agencies for all tort liability whenever they are engaged in the exercise or discharge of a governmental function." *Nawrocki v Macomb Co. Rd. Comm'n.,* 463 Mich 143, 156 (2000). The immunity conferred upon governmental agencies is broad, while the statutory exceptions to governmental tort immunity are narrowly construed. *Id*. at 158.

Under Michigan law, "[I]t is the responsibility of the party seeking to impose liability on a governmental agency to demonstrate that its case falls within one of the exceptions [to governmental immunity]." *Mack v Detroit*, 467 Mich 186, 198 (2002). Plaintiff's Complaint does not plead in avoidance of governmental immunity with respect to his claim, sounding in tort, for wrongful termination in violation of public policy, nor

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does it contain any of the exceptions to governmental immunity stated in the Government Tort Liability Act, MCL 691.1401 et seq.

Governmental immunity under MCL 691.1407(1) was an alternative basis for summary disposition of Plaintiff's wrongful discharge claim because Elba Township is clearly a governmental agency, and it was engaged in a governmental function while participating in the Interlocal Agreement for the CCA, for the purpose of administration and enforcement of its ordinances.

For purposes of the Government Tort Liability Act, a "governmental agency" includes, generally, political subdivisions of the state, municipal corporations, and combinations of them acting jointly. MCL 691.1401. A "governmental function" is defined as "[a]n activity that is expressly or impliedly mandated or authorized constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f).

Here, the Interlocal Agreement that Elba Township participated in to establish and participate in the CCA is expressly permitted by the Urban Cooperation Act of 1967, MCL 124.501 et seq. That Act provides that "public agencies that are parties to a contract entered into pursuant to this Act have the responsibility, authority, and right to manage and direct on behalf of the public the functions or services performed or exercised to the extent provided in the contract." MCL 124.505(2).

Under the Interlocal Agreement establishing the CCA, each participating municipality may decide to enforce some of its own codes and have the CCA enforce other of its codes. [Elba Twp MSD, Ex E, Interlocal Agreement, Section 5]. Therefore, Elba Township was engaged in a governmental function when administering its code enforcement in regard to the CCA's services, and Elba Township has tort immunity

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under MCL 691.1407(1) from Plaintiff's wrongful discharge claim. Governmental immunity provided an alternative basis for the dismissal of Plaintiff's wrongful discharge claim.

III. NO COURT HAS EXPRESSLY RULED ON PLAINTIFF'S VERBAL REQUEST TO AMEND HIS COMPLAINT AT THE SUMMARY DISPOSITION MOTION HEARING, AND PLAINTIFF DID NOT PRESERVE THIS ISSUE FOR APPEAL.

A. Standard of Review:

Plaintiff sets forth no standard of review of this argument. "The grant or denial of a motion for leave to amend pleadings is reviewed for an abuse of discretion." *Titan Ins v North Pointe Ins*, 270 Mich App 339, 346 (2006). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526 (2008).

B. This issue is not preserved for review. :

Generally, an issue must be raised, addressed, and decided to be preserved for appellate review. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 533 (2003).

Plaintiff never filed a written motion under MCR 2.119 or MCR 2.118 outlining his reasons or basis for requesting to amended his Complaint. Nor did he present a proposed amended Complaint for the trial court's consideration. [Register of Actions]. Rather, at the oral argument on the Defendants' dispositive motions, Plaintiff's counsel stated that: "Should the Court feel that the complaint is not sufficient, we ask, of course, for leave to amend." [3/2/15 Trans, p6]. The trial court did not expressly address that request, but implicitly denied it by granting summary disposition in favor of the Defendants on the basis of the WPA statute of limitations, pre-emption of Plaintiff's wrongful termination claim, and failure to state a claim for civil conspiracy. None of

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these grounds for summary disposition were based on an insufficiency with the Plaintiff's Complaint, however. [3/2/15 Trans, pp7-15].

Thereafter, in the Court of Appeals, none of the Plaintiff's three "Statement of Questions Involved" in his Appellant Brief raised the issue of whether or not the trial court abused its discretion in not permitting an amended Complaint, nor did the Court of Appeals address that unpresented issue. The issue is therefore unpreserved.

Plaintiff argues that none of the Defendants have advanced an argument for why he should not be permitted to amend his complaint. [Plf Application, p29]. This is not entirely accurate. All Defendants argued for summary disposition on grounds of the WPA statute of limitations, WPA pre-emption, failure to state a claim, and/or governmental immunity. None of these grounds concerned an insufficiency in Plaintiff's Complaint that could be remedied by amendment. Additionally, no amount of further discovery, nor any amendment to the Complaint, could change the fact that: (1) Plaintiff's lawsuit was filed more than 90 days after the occurrence of Elba Township's alleged violation of the WPA, and (2) Plaintiff's wrongful discharge claim was preempted by the WPA and/or barred by governmental tort immunity.

Plaintiff has never developed or articulated a basis for his request to amend his Complaint other than stating in conjunction with his argument in opposition to the Defendants' summary disposition motions that: "Should the Court feel that the complaint is not sufficient, we ask, of course, for leave to amend." [3/2/15 Trans, p6]. Plaintiff has also never provided a proposed amended Complaint for any party's or Court's consideration as to whether it would be permitted under MCR 2.118 and *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649 (1973).

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Plaintiff failed to preserve this issue for this Court's review or consideration.

RELIEF REQUESTED

For the reasons set forth herein, Defendant-Appellee ELBA TOWNSHIP respectfully request that this Honorable Court Honorable Court deny Plaintiff-Appellant Millar's Application for Leave to Appeal, and allow the unpublished decision of the Court of Appeals to stand

Respectfully submitted,
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[**PROOF OF SERVICE**

The undersigned hereby states that Defendant/Appellee Elba Township's Answer to Plaintiff/Appellant's Application for Leave to Appeal, with Attachments, and Proof of Service, was served on all attorneys of record on October 13, 2016 through this Court's TrueFiling service.

/s/ Maggie Fisher
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